



## THE NEWS

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### Washington State Law Banning Cigarette Sampling Violates Federal Law

#### Federal District Court Judge Grants Summary Judgment Motion For R.J. Reynolds Tobacco Company

R.J. Reynolds Tobacco Company applauds today's decision striking down a Washington State law that prohibits tobacco companies from sampling products to adult smokers in bars, nightclubs and other age-restricted venues.

In its court filing, R.J. Reynolds claimed the law, approved by Gov. Christine Gregoire on March 9, violated the First Amendment and is preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA), the federal law that generally bars states from regulating cigarette advertising and promotion.

"The law said its purpose was to protect minors, but Washington law already prohibits cigarette sampling where minors may be present," says Darryl R. Marsch, senior counsel for R.J. Reynolds. "The new law was simply an unconstitutional attempt to prevent us from using an accepted form of product promotion to adult smokers."

In his ruling, U.S. District Court Judge Franklin D. Burgess stated: "The State ban on the distribution of cigarettes to members of the general public at no cost or at nominal cost for product promotion purposes is a state regulation of the promotion of cigarettes and thus, preempted by the FCLAA."

The law, which took effect June 7, is unenforceable as a result of today's ruling.

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COVINGTON &amp; BURLING

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**"FLAVORED CIGARETTES" BILL SHOULD BE REJECTED**

SB 2503 (SD1) would ban the sale of any cigarette that contains "a natural or artificial constituent or additive that causes the cigarette to have a characterizing flavor." The bill defines "characterizing flavor" as –

any distinguishable taste or distinctive natural or artificial taste, flavor, smell, or aroma, other than tobacco or menthol, which emanates from or is imparted by the cigarette, the cigarette's smoke, or any of the cigarette's component parts at any time prior to or during consumption.

SB 2503 (SD1) would ban virtually all cigarettes currently on the market. Proponents might believe that most cigarettes taste alike, and that cigarettes having a "distinguishable" or "distinctive" taste are the rule and not the exception. That is like saying all colas or beers taste the same. Only someone who doesn't drink them would say so.

Cigarette manufacturers use flavorings for the same reason as manufacturers of other products – from mayonnaise to mustard, from peanut butter to pickles, from chocolate to chewing gum: To create distinct identities for their brands and thereby capture market share. Banning the use of flavorings that give cigarettes a "distinguishable" or "distinctive" taste would amount to banning most cigarettes.

No other state has enacted similar legislation. Proponents have suggested that other states have already enacted similar legislation. That is incorrect. The proponents are apparently referring to state laws the ban or limit the sale of a particular type of cigarette known as "bidis," produced in India and Southeast Asia.

Federal proposals to ban "characterizing flavors" refer to product claims. Pending federal legislation would ban cigarettes with "characterizing flavors." E.g., S. 1074, 109th Cong., § 231 (2005). As used in that legislation, however, "characterizing flavor" refers to *flavor claims* made about the cigarette. FDA food regulations define "characterizing flavor" as a flavor that a food, *as marketed*, would be expected to have. For example, a food marketed as "strawberry shortcake" would be expected to have a strawberry taste. 21 C.F.R. § 101.22(i).

A state law banning cigarettes that have a "characterizing flavor" as FDA defines the term would be preempted and violate the First Amendment. The Federal Cigarette and Labeling Act "pre-empts state regulations targeting cigarette advertising" – even regulations motivated by "concerns about minors." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 550 (2001). The First Amendment likewise forbids such state laws. *Id.* at 556-57; see also *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87 (2d Cir. 1998).

For these reasons, SB 2503 (SD1) and any like measure should be rejected.

*This memorandum of law was prepared at the  
request of R.J. Reynolds Tobacco Co.*